IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1609

TERRY T. TORRES, *Appellant,*

v.

COMMONWEALTH OF PUERTO RICO, *Appellee*

On Appeal from the Supreme Court of the Commonwealth of Puerto Rico

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MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the Commonwealth of Puerto Rico on the grounds that the appeal as a whole does not present a substantial federal question and at least one of the federal questions sought to be reviewed was not timely raised or properly raised nor expressly passed on.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment and decree entered on by the Supreme Court of the Commonwealth of Puerto Rico upholding the judgment rendered by the Superior Court, San Juan Section on the 22nd day of December, 1976, convicting appellant for violating article 404 of the Controlled Substances Act. (Title 24 L.P.R.A. 2404).

It raises, among others, the question of the validity of Commonwealth of Puerto Rico Public Law No. 22, of August 6, 1975, Title 25 L.P.R.A., secs. 1051-1054:

> "To empower and authorize the Police of Puerto Rico to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question and search those persons whom the Police have ground to suspect that are illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances."

and of Article V, Sec. 4 of the Constitution of the Commonwealth of Puerto Rico, as applied to appellant, which provides:

> "The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law."

Facts stated on appellant's Jurisdictional Statement are basically correct and in order to avoid repetition we adopt them herein, merely adding the fact that when appellant's luggage was searched by the officers a paper bag containing marihuana, a pipe with marihuana residues and $250,000 in cash were found.

SUMMARY OF ARGUMENT

Pursuant to Rule 40 of the Rules of this Court, appellee succinctly states a summary of the argument herein contained. Appellee's motion to dismiss or affirm will be based, firstly, on the fact that at least one of the federal questions sought to be reviewed was not timely raised or expressedly passed on, particularly the question dealing with Article V, Sec. 4 of the Constitution of Puerto Rico. It will be our contention that appellant did not use the procedural mechanism provided by Rule 45 of the Rules of the Supreme Court of Puerto Rico, thus refusing to give the Puerto Rican Supreme Court a chance to interpret its own constitution, limiting himself to raising the issue for the first time before this Court.

Secondly, appellee's motion will also be based on the fact that the appeal as a whole does not present a substantial federal question. In relation to the fact that Article V, Section 4 of the Constitution of the Commonwealth of Puerto Rico violates the due process clause, appellee will discuss similar patterns found in various state constitutions and how they have been constitutionally upheld.

As far as the other questions are concerned, appellee will discuss what we have called a functional approach to frontiers, viewing Puerto Rico as an intermediate boundary such as the Virgin Island's one. A discussion of why searches without probable

cause ought to be allowed in intermediate borders will follow, considering factors such as the police power of the states.

ARGUMENT

We have considered it more convenient to alter the order of the issues presented by the appellant in view of the fact that an attack upon the jurisdiction of this Court will be part of our argument. After the discussion of the jurisdictional matter, the substantiality of the questions presented will be discussed.

ONE OF THE QUESTIONS SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED NOR WAS EXPRESSLY PASSED UPON

In his Jurisdictional Statement, appellant raised the question as to whether the provision of the Puerto Rican Constitution which requires a majority vote of the total number of Justices of which the Supreme Court is composed, before a statute can be declared invalid, unconstitutionally violates appellant's right to due process.

Article V, Section 4 of the Constitution of Puerto Rico provides that:

> ". . . no law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law."

Public Law Number 11, of July 24, 1952, Title 4 L.P.R.A. section 31, which implements this constitutional provisions, reads as follows:

> "The Supreme Court shall be the court of last resort in Puerto Rico, and shall be composed of a Chief Justice and six Associate Justices. The number of justices may be changed only by law upon request of the Supreme Court. While there is no vacancy in addition to the existing one, the Court shall continue sitting as at present constituted.
>
> The Supreme Court shall sit, in accordance with rules adopted by it, as a full court, or in divisions composed of not less than three (3) justices. No law shall be held unconstitutional unless by a majority of the total number of justices composing the Court in accordance with the Constitution of the Commonwealth or with law."[1]

The facts already stated show that on December 14, 1977 a judgment was rendered by the Puerto Rican Supreme Court whereby although a majority of the Justices who heard the case (seven (7) Justices, since one of the members of the Court did not participate), believed Public Law 22, supra, to be unconstitutional, said judgment was nevertheless affirmed pursuant to the aforementioned Article V, Section 4 of the Constitution of the Commonwealth of Puerto Rico. (Appellants Appendix B pp. 99-100)

It is also accepted by the appellant that it was not until April 14, 1978, while the case was already before this Honorable Court, that an untimely motion for reconsideration was filed in the Puerto Rican Supreme Court. (Appellant's Jurisdictional Statement, pp. 20) It was in this untimely filed motion that appellant, for the first time, raised the question of the possible unconstitutionality of Article V, Section 4 of the Consti-

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[1] It should be noted that appellant agrees that the Supreme Court was composed of a total number of eight members at the time the constitutional questions were raised (Appellants Jurisdictional Statement, page 25).

tution of Commonwealth of Puerto Rico as applied in his case (Appellee's Appendix A p. 1a).

Appellant incorrectly argues that this issue appeared for the first time after the judgment of the Puerto Rican Supreme Court and thus it could not have been raised before. Appellee earnestly differs from appellant's argument and is of the opinion that the issue was not properly raised nor expressly passed upon. The only new fact included in the Motion for Reconsideration was a reference to a newspaper report which alleged that Mr. Justice Rigau, who did not participate in the Court's decision, was willing to pass judgment [1] and vote on the constitutionality of Public Law 22, supra.

Rule 45 of the Rules of the Puerto Rico's Supreme Court (Title 4 L.P.R.A. App. I-A) reads as follows:

> "(a) Ten working days after copy of the decision of the Court rendered in a case has been sent to the parties, the Clerk shall send the mandate to the trial court, unless a motion for reconsideration has been filed within said term, or the Court has ordered the retention of the mandate.
>
> (b) Any motion for reconsideration must be filed within the aforementioned term of 10 working days. No separate memorandum of authorities or a petition for extension to ground a reconsideration filed, shall be accepted; the authorities must be discussed in the body of the motion. The Clerk shall deny outright any petition for extension to file a motion for reconsideration, or papers in support thereof.

[1] It should be noted that the Rules of the Supreme Court of Puerto Rico in its Rule 3 (4 L.P.R.A. App I-A) prohibits the Chief Justice to exclude any Justice of the Court of performing his functions against his will.

> (c) Once the motion for reconsideration has been decided, the mandate shall be sent three working days after the copy of the order regarding the reconsideration has been sent to the parties, and any subsequent motion for reconsideration shall be filed within said term.
>
> (d) Any motion for reconsideration filed out of the aforementioned terms shall be considered by the Court only in the degree in which what is requested therein can be totally or partially granted without adversely effecting the execution of the mandate.
>
> (e) In any case in which a judgment or order of this Court may be reviewed by the Supreme Court of the United States by way of certiorari, the mandate to the trial court may be retained, at the request of a party, for a reasonable period of time. If within such term there shall be filed with the Office of the Clerk a certificate from the Clerk of the Supreme Court of the United States establishing the fact that the petition for certiorari, the record, and the brief have been filed before that Court, the mandate shall be retained until final disposition of the petition for certiorari. Upon presentation of a copy of the order of the Supreme Court of the United States denying the issuance of the writ, the mandate shall forthwith be sent to the trial court. In the motion for retention of the mandate, the moving party shall recite the questions to be raised in the petition for certiorari, making reference to the pertinent facts and circumstances of the case."

Once appellant received the Supreme Court of Puerto Rico's decision of December 14, 1977, he was duly apprised that only seven of the eight justices who form said Court had participated in the adjudication of his case, he was also aware of the fact that a majority of them, four, were of the opinion that Public

Law No. 22, supra, was unconstitutional. Notwithstanding the fact that he was then on notice of the aforementioned, he did not avail himself of the procedural mechanism provided by the above cited Rule 45 to timely file his motion for reconsideration and raise the constitutional issue, thus giving the Puerto Rican Supreme Court a chance to interpret its own constitution. Appellant has just limited himself to raising the issue for the first time before this Court. Appellant's possible argument that a motion for reconsideration was filed is of no avail since this was not done within the time limit provided by the already cited Rule 45, namely 10 working days. Therefore, we understand as did the Supreme Court of Puerto Rico in its Resolution of May 4, 1978 (Appellee Appendix B, p. 6a), that appellant's motion for reconsideration was untimely.

It has been a long established rule of this Court that the attempt to raise a federal question after judgment by the highest State Court, upon a petition for rehearing, comes too late, unless the court actually entertains and decides the question. *McCorguoadale* v. *State of Texas,* 211 U.S. 432 (1908); *Forber* v. *State Council of Virginia,* 216 U.S. 396 (1910); *Consolidated Turnpike* v. *Norfolk & Ocean View Ry. Co.,* 228 U.S. 326 (1913); *Godchaux Co.* v. *Estopinal,* 251 U.S. 179 (1919); *American Surety Co.* v. *Baldwin,* 287 U.S. 156 (1932); *Herndon* v. *Georgia,* 295 U.S. 441 (1935); *Radio Station WOW* v. *Johnson,* 326 U.S. 120 (1945); *Hanson* v. *Denckla,* 357 U.S. 235 (1958).

Furthermore and along this same line of thought this Court has held that when a constitutional question is not timely raised in state court proceedings that question is not open in proceedings on petition for certiorari. *Ellis* v. *Dixon,* 349 U.S. 458, 99 L. Ed. 1231 (1955), *rehearing denied* 350 U.S. 855, 100 L. Ed. 759.

Flournoy v. *Wiener,* 321 U.S. 253, 88 L. Ed. 708 (1944). See also *Corretjer* v. *People of Puerto Rico,* 194 F. 2d 527 (1952); *Prensa Insular de Puerto Rico* v. *People of Puerto Rico,* 189 F. 2d 1019 (1951).

In *Radio Station WOW* v. *Johnson,* supra, this Court held:

> ". . . . This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' § 237 of the Judicial Code, 28 U.S.C. § 344 (a). This requirement is not one of those technicalities to be earily scorned. It is an important factor in the smooth working of our federal system." (at pp. 124)

* * *

"Questions first presented to the highest state court on a petition for rehearing come too late for consideration here, unless the state court exerted its jurisdiction in such way that the case could have been brought here had the questions been raised prior to the original disposition." (at pp. 128)

Again in *North Dakota Pharmacy B.D.* v. *Snyder's Drug Stores,* 414 U.S. 156 (1973) this Court stated:

> "The finality requirement of 28 U.S.C. § 1257, which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs."

See also *Tacon* v. *Arizona,* 410 U.S. 351 (1973), *Jenkins* v. *Georgia,* 418 U.S. 153 (1974); *Banks* v. *California,* 395 U.S. 708 (1969); *Lamb Enterprises Inc.* v. *Kiroff,* 399 F. Supp. 409 (1975); *J.&S. Construction* v. *Travelers,* 520 F. 2d 809 (1975).

This judicial norm is of even more appropriate application when dealing with a case originating in the Supreme Court of Puerto Rico since it has been a long standing rule of this Court that:

> ". . . 'For a due regard for the status of that Commonwealth under its compact with the Congress of the United States dictates, we believe, that it should have the primary opportunity through its courts to determine the intended scope of its own legislation and to pass upon the validity of that legislation under its own constitution as well as under the Constitution of the United States.' 266 F. Supp. 401, 405 (1966)". See *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974).

In view of the above to remand the case for consideration of the motion for reconsideration would be equivalent to amending Puerto Rico's Supreme Court

Rule 45 and granting the appellant a right which he deliberately surrendered by his own lack of due diligence.

Now even if the question concerning the constitutionality of Article V, Sec. 4 of the Commonwealth of Puerto Rico, supra, as applied to appellant's case were properly before this Court, we are of the opinion that it does not present a substantial federal question.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. "Whether Art. V. Sec. 4 of the Constitution of the Commonwealth of Puerto Rico Operate to Deny Appellant His Right to Due Process of Law by Precluding the Supreme Court of Puerto Rico From Reversing Appellant's Conviction for Possession of Marihuana Even Though A Majority of the Justices Who Heard the Case Were Convinced That the Conviction Was Obtained In Violation To the Fourth Amendment of United States Constitution?" (Appellant's Jurisdictional Statement p. 5)

Article V. section 4 of the Constitution of Puerto Rico provides that:

> ". . . no law shall be held unconstitutional except by a majority of the total number of justices of which the Court is composed in accordance with this Constitution or with the law."

The motives for this specific wording are found in the following portion of the legislative debates:

> ". . . What we have wished to establish here is to constitutionally acknowledge the validity of the principle that every statute is presumed constitutional, and establish that, in order to declare it anticonstitutional, it is not enough to have a majority of the number acting at a given moment in the court, but rather the absolute majority

of all members comprising the court as formed . . . and it is precisely responding to the principle that there must prevail the will legislatively expressed by the people at a given moment, and that the principle presuming every statute constitutional must be sustained. . . . What the last provision wishes to avoid is that in a court of five members where, for any reason, only three are acting, two of these may decide for constitutional. . . ." (Appellee's translation) I Diario de Sesionses de la Convención Constituyente 568, 569, 3 de diciembre de 1951.

On the other hand, Puerto Rico's Constitution is not unique in this respect, similar patterns are found in various state constitutions and have been constitutionally upheld. See *Ohio ex rel Bryant* v. *Akron Metropolitan Park District,* 281 U.S. 74 (1930), *City of Bismarck* v. *Materi,* 177 N.W. 2d 530, 537 (1970), *Funkhouser* v. *Spahr,* 102 Va. 306, 46 S.E. 378 (1904). States such as North Dakota,[3] Arizona,[4] Virginia [5] and Colorado [6] have very similar provisions.

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[3] The Constitution of North Dakota in its Art. IV, Secs. 86 and 88 reads as follows:

". . . The Supreme Court shall consist of 5 justices, one of whom shall be designated chief justice in the manner provided by law."

Sec. 88:

"A majority of the Supreme Court shall be necessary to constitute a quorum or to pronounce a decision, provided that the Supreme Court shall not declare a legislature enactment unconstitutional unless at least four of the members of the court so decide."

See: 13 North Dakota Century Code Annotated 30, 33; *City of Bismarck* v. *Materi,* 177 N.W. 2d 530, 537 (1970). *Wilson* v. *Fargo,* 186 N.W. 263 (1921), *State ex rel Mason* v. *Baker,* 288 N.W. 206 (1936).

(Footnotes 4, 5 and 6 on facing page)

It is the constitutional prerogative of the Supreme Court of Puerto Rico to determine the internal regulations of its working. See art. V sec. 4 of the Constitution of the Commonwealth, supra.

In the Rules adopted by the Supreme Court of Puerto Rico under its regulatory powers we find Rule 3 and Rule 6 of the Rules of the Supreme Court (Title 4 L.P.R.A. App. I A) which govern this matter case reads as follows:

Rule 3 reads as follows:

(4) *Sitting in full*

The Court sitting in full shall take cognizance of the decision of all civil and criminal matters, and shall intervene in complaints against judges

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[4] The Constitution of Arizona, Art. 6, Sec. 2:

"The Supreme Court shall consist of not less than five justices . . .

The Supreme Court shall sit in accordance with rules adopted by it either in banc or in divisions or not less than three justices, but the court shall not declare any law unconstitutional except when sitting in banc . . ."

See: 1 Arizona Revised Statutes Annotated 72.

[5] The Constitution of Virginia, Art. VI, sec. 2:

"The Supreme Court shall consist of 7 justices . . . no decision shall become the judgment of the Court, however, except on the concurrence of at least 3 justices, and no law shall be declared unconstitutional under either this Constitution or the Constitution of United States except on the concurrence of at least a majority of all the justices of the Supreme Court."

(See 1 Code of Virginia, 80; *Funkhouser* v. *Spahr,* 102 Va. 306, 46 S.E. 378 (1904)).

[6] The Constitution of Colorado, Art. VI, Sec. 5 states:

"No less than 7 justices who may sit in banc or in departments . . . No case involving construction of the constitution of this State or of the United States shall be decided except by the court in banc." (See 5 Colorado Revised Statutes Annotated 141, (1935 Ed.)

and in disciplinary proceedings against the rehabilitation of attorneys.

The decisions of the Court in full shall be adopted by a majority of the justices who participate, but no law shall be held unconstitutional except by a majority of the total number of justices of which the Court is composed. . . .

(b) *Organization of the divisions*

The Chief Justice shall designate the justices who shall compose the Divisions, but no justice shall be excluded from that function against his will. Whenever it might be necessary in order to prevent such exclusion, the members of the Division or Divisions shall be rotated.

All the justices composing a Division shall take part in the consideration and decision of all the matters submitted to the same. The votes of at least half of the justices who participate shall be required for the issuance of a writ. The orders of a Division shall be identified as originating in the Division delivering them, setting forth the justices who compose it. . . .—May 23, 1975 eff. September 1, 1975, amended May 27, 1976 eff. June 1, 1976.

Rule 6 reads:

"Five justices shall constitute a quorum when the Court is sitting in banc. The quorum for a Division shall be the total number of the Justices who compose it."—May 23, 1975. eff. Sept. 1, 1975.

Can it be said that cases decided by a Court with only a quorum sitting are violative of due process?

By constitutional mandate the Florida Supreme Court[1] consists of seven justices of which 5 shall constitute quorum and the concurrence of four shall be necessary to a decision. Recently in the case of *Campbell* v. *Supreme Court of Florida,* 428 F. 2d 449 (1970) the Court upheld the statute in question, on an appeal from a death penalty held before five justices rather than seven justices and where a decision concurred by three rather than four justices was rendered, on the grounds that the above procedure did not deprive the accused of his right to due process. Notice the similarity of this provision with the Puerto Rico's Supreme Court Rule 6 cited above.

It is thus our contention that appellant has not shown how his right to due process was abridged and therefore that no substantial federal question has been raised.

B. "Whether Puerto Rico May Constitutionally Enact A Law That Authorizes the Indiscriminate Warrantless Search and Seizure, Without Probable Cause, of Persons and Property Arriving In Puerto Rico From Other Parts of the United States."

"Whether Puerto Rico Constitutionally May Create A 'De Facto' International Border Between Itself and Other Parts of the United States?"

"Whether Public Law No. 22, 25 L.P.R.A. § 1051-1054, Unlawfully Abridges the Right to Travel By Subjecting Individuals to Indiscriminate, Warrantless Searches Without Probable Cause Upon Their Entry Into the Commonwealth of Puerto Rico From Other Parts of the United States?"

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[1] The Florida Constitution in its art. V, sec. 3 reads:

"The Supreme Court shall consist of 7 justices . . . five shall constitute a quorum. The concurrence of four shall be necessary to a decision . . ."

(See 25 Florida Statutes Annotated 127)

I. Functional Approach to Frontiers:

It has been said that there are just two categories of intercommunity borders: international frontiers[8] or interstate borders. However there already exist, with legal recognition, other types of borders that do not fit either of these two categories. This case deals with precisely one such type of intermediate boundary.

In *Almeida Sánchez* v. *U.S.*, 413 U.S. 266 (1973), this Honorable Court went beyond a strictly geographical understanding of what and where a frontier is. In that case, we might recall, the United States Supreme Court established a new working scheme labeled "functionally equivalent" borders. A station near the physical territorial edge of the country was held to be a border for Fourth Amendment purposes. Likewise, an airport in a midwestern city very distant from the actual geographical frontier was also functionally equivalent to the border post. Thus the traditional conceptual or exclusively landmark based border has already been superseded.

This is not to deny that legal notions of frontiers are related to geographical boundaries which themselves sometimes coincide with political boundaries. There can be economic cultural, tax, population and ethnic frontiers which are not given constitutional recognition, although their distinctiveness cannot be denied. The notion of a frontier is not a magic litmus paper that either grants total immunity or total subjection of the citizen to the intrusive interests of the

[8] Section 287 (a) of the Immigration Nationality Act (8 U.S.C.A., Section 1357 (a), 19 U.S.C. Section 482, 1461, 1467, 1496, 1581, 1582) See also *U.S.* v. *Ramsey*, 45 L.W. 4577 (1977).

state no matter how lofty they be. There are gradations of bundles of rights that depend on the type of intercommunity border under scrutiny.

In this case we are dealing with a boundary that is politically, geographically, economically, culturally and taxwise recognizable as distinct from the continental union of states and its interstate borders: although it clearly does not reach the category of an international border.[9]

Admittedly there are few such intermediate boundaries but this does not mean that the notion is spurious just because it has limited application.

Our neighboring Virgin Islands can be cited as one of such intermediate boundaries given recognition in law. On incoming flights or vessels from the Virgin Islands all passengers of American or foreign citizenship are subject to searches under section 581 Tariff Act of 1930 as amended 19 U.S.C. Sec. 1581. Also see 19 U.S.C. § 1467.[10]

[9] See the cases of *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41 (1970); *Calero Toledo* v. *Pearson Yatch Leasing Co.*, supra; *Examining Board of Engineers* v. *Flores Otero*, 426 U.S. 572 (1976).

[10] 19 U.S.C. sec. 1581:

"(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under sections 1701 and 1703-1711 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package or cargo on board, and to this end may hail and stop such vessel or vehicle and use all necessary force to compel compliance.

(Footnote 10 continues on following page)

(b) Officers of the Department of the Treasury and other persons authorized by such department may go on board of any vessel at any place in the United States or within the customs waters and hail, stop, and board such vessel in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws.

(c) Any master of a vessel being examined as herein provided, who presents any forged, altered or false document or paper to the examining officer, knowing the same to be forged, altered, or false and without revealing the fact shall, in addition to any forfeiture to which in consequence the vessel may be subject, be liable to a fine of not more than $5,000 nor less than $500.

(d) Any vessel or vehicle which, at any authorized place, is directed to come to a stop by any officer of the customs, or is directed to come to a stop by signal made by any vessel employed in the service of the customs and displaying proper insignia, shall come to a stop, and upon failure to comply a vessel or vehicle so directed to come to a stop shall become subject to pursuit and the master, owner, operator, or person in charge thereof shall be liable to a penalty of not more than $5,000 nor less than $1,000.

(e) If upon the examination of any vessel or vehicle it shall appear that a breach of the laws of the United States is being or has been committed so as to render such vessel or vehicle or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel or vehicle, liable to forfeiture or to secure any fine or penalty, the same shall be seized and any person who has engaged in such breach shall be arrested.

(f) It shall be the duty of the several officers of the customs to seize and secure any vessel, vehicle, or merchandise which shall become liable to seizure, and to arrest any person who shall become liable to arrest, by virtue of any law respecting the revenue, as well without as within their respective districts, and to use all necessary force to seize or arrest the same.

(g) Any vessel, within or without the customs waters, from which any merchandise is being, or has been, unlawfully introduced into the United States by means of any boat belonging to, or owned, controlled, or managed in common with, said vessel, shall be deemed to be employed within the United States and, as such, subject to the provisions of this section.

(h) The provisions of this section shall not be construed to authorize or require any officer of the United States to enforce

This power given by Congress to customs agents allows them to search without probable cause.[11]

Although labeled a mere "administrative search" the tag is rather misleading, fruits of the search may lead to criminal indictments.

(Footnote 10 concluded)

any law of the United States upon the high seas upon a foreign vessel in contravention of any treaty with a foreign government enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon said vessel upon the high seas the laws of the United States except as such authorities are or may otherwise be enabled or permitted under special arrangement with such foreign government. June 17, 1930, c. 497, Title IV, § 581, 46 Stat. 747; Aug. 5, 1935, c. 438, Title II, § 203, 49 Stat. 521; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097; Sept. 1, 1954, c. 1213, Title V, § 504, 68 1141."

19 U.S.C. Sec. 1467:

"Whenever a vessel from a foreign port or place or from a port or place in any Territory or possession of the United States arrives at a port or place in the United States or the Virgin Islands, whether directly or via another port or place in the United States or the Virgin Islands, the appropriate customs officer for such port or place of arrival may, under such regulations as the Secretary of the Treasury may prescribe and for the purpose of assuring compliance with any law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce, cause inspection, examination, and search to be made of the persons, baggage, and merchandise discharged or unladen from such vessel, whether or not any or all such persons, baggage, or merchandise has previously been inspected, examined, or searched by officers of the customs."

[11] The right of border search does not depend on probable cause. See *Carroll* v. *U.S.*, 267 U.S. 132 (1924); *Johnson* v. *U.S.*, 333 U.S. 10 (1948); *Boyd* v. *U.S.*, 116 U.S. 616 (1874); *U.S.* v. *Yee Ngee How*, 105 F. Supp. 517 (1952); *King* v. *U.S.*, 258 F.2d 754, *certiorari denied* 359 U.S. 939 (1958); *Murgia* v. *U.S.*, 285 F.2d 14, *certiorari denied* 366 U.S. 977 (1960).

The Virgin Islands' border, however, do not have all the ingredients usually included in the concept of an international frontier. Noticeably absent from the crossing of this intermediate border are passport checkpoints. The islands are also under American sovereignty, thus no international frontier has been crossed and yet a search without probable cause takes place.

For security purposes even an intrastate movement of passengers can open a person to a limited search such as in the aircraft hijacking cases. To that effect *U.S.* v. *López*, 328 F. Supp. 1077 (1971); *U.S.* v. *Epperson*, 454 F. 2d 769 (1972); *U.S.* v. *Moreno*, 475 F. 2d 44 (1977); *U.S.* v. *Doran*, 482 F. 2d 929, 932 (1973). *U.S.* v. *Cyzewski*, 484 F. 2d 509 (1973), *certiorari denied* 415 U.S. 902. See also 49 U.SC. 1357 (b), 1472 (1), 1511 (a)

Also in point are the cases of Gateway Military Inspections which allow the inspection of civilian and military personnel entering or leaving a base installation. *U.S.* v. *Lange*, 15 C.M.A. 486 (1965); *U.S.* v. *Brown*, 10 C.M.A. 482 (1959); *U.S.* v. *Florence*, 1 CMA 620 (1952).[12]

We are faced with the issue of whether for the purposes of the Fourth Amendment in an intermediate border situation Puerto Rico is in a peculiar situation like those of the Virgin Islands, Military Gateways or airports where antihijacking searches are made.

We cannot approach the problem of whether the Commonwealth should be allowed to conduct border searches by saying that Puerto Rico is just like any

[12] *Gateway Inspections. The Admissibility of Evidence Seized*, 19 A.F. Law Review 199-277 (1977).

other State for Fourth Amendment purposes. It is already not equivalent to any other state for certain other purposes. For example, some products of the island pay an excise tax upon arriving in the continental United States.[13] The Commonwealth Legislature is reciprocally entitled to levy tariffs on some goods imported into the island from the United States.[14] Agricultural Department inspections can also be made of the baggage of any arriving or departing passengers on flights between Puerto Rico and the continental United States.[15] It should be noted that the fruits of this so-called administrative search are admitted into the criminal indictments of the owners of the baggage.

[13] Title 1 L.P.R.A. sec. 9 reads:

"That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal-revenue laws other than those contained in the Philippine Trade Act of 1946: *Provided, however*, That hereafter all taxes collected under the internal-revenue laws of the United States on articles produced in Puerto Rico and transported to the United States, or consumed in the Island shall be covered into the Treasury of Puerto Rico.—"

[14] 19 U.S.C.A. Sec. 1319—Duty on coffee imported into Puerto Rico

"The legislature of Puerto Rico is empowered to impose tariff duties upon coffee imported into Puerto Rico, including coffee grown in a foreign country coming into Puerto Rico from the United States. Such duties shall be collected and accounted for as now provide by law in the case of duties collected in Puerto Rico."

This section authorizes the Legislature of Puerto Rico to levy customs duties on coffee imported into Puerto Rico. (See *Pan Am.* v. *U.S.*, 177 F. Supp. 769 (1959)).

[15] 7 U.S.C. Section 161. Quarantine Protection Act. Sec. 318.58, section 8 of the Plant Quarantine Act of August 20, 1912.

Recently this Court in the case of *Joseph Califano* v. *Ceasar Gautier Torres*, et als, 76 L.W. 3539 (1978) has decided that Puerto Rico is not like New Jersey, Connecticut or Massachusetts or any other state for the purposes of welfare legislation.

Furthermore, under sections 9, 38 and 58 of the Federal Relations Act, Title 1 L.P.R.A. recognition is made of a special situation in the application of federal laws particularly tax and interstate commerce laws.

All of these pecularities of the Puerto Rican situation arise from the fact that the Treaty of Paris gave Congress broad discretionary powers over the island government, a power which this Court has left untouched. See *Downes* v. *Bidwell* 182 U.S. 244 (1901) Congress by explicit legislation or delegated power has created the uniqueness of the Puerto Rican situation.

The Commonwealth itself, as a political entity, has its origin in Public Law 600 of the 81st Congress entitled "An Act to provide for the Organization of a Constitutional Government by the People of Puerto Rico." Its preamble reads:

> "WHEREAS the Congress of the United States by a series of enactments has progressively recognized the right of self-government of the people of Puerto Rico; and
>
> "WHEREAS under the terms of these congressional enactment an increasingly large measure of self-government has been achieved: Therefore
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, that, fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government of their own adoption." L.P.R.A., Vol. 1, pp. 136-137.

The body politic that eventually was created by mutual agreement between the Congress and the People of Puerto Rico is not a federated state, even though it is within the constitutional structure of the United States. Its creation responded to economic, political, ethnic, historical, cultural, and geographical realities. It is considered a unique entity [16] where, with limited incidence, laws and principles of federation operate with exceptions to the uniform standards that govern the States of the Union.

In view of the above the Commonwealth status creates borders between Puerto Rico and the Continental states that are neither interstate nor international borders, but a special situation. We conclude that the Fourth Amendment exception to a probable cause requirement as is presently found in international border searches should also be applicable to the Puerto Rican "border searches" as is already the case in the "border searches" at the United States Virgin Islands passengers arriving or departing from Puerto Rico or the States. Congress, under the powers granted by the Territorial Clause, has created a special, exceptional status.

It is also important to bear in mind that Puerto Rico is an island with clearly defined natural boundaries with problems peculiar to international frontiers, particularly, since its nearby neighbors as a whole are poor

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[16] *Mora* v. *Mejías*, 115 F. Supp. 610 (1953); *Wackenhut Corp.* v. *Aponte*, 386 U.S. 268 (1967); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, supra; *Examining Board of Engineers* v. *Flores de Otero*, supra; *Fornaris* v. *Ridge Tool Co.*, supra.

independent nations. This is precisely what encourages the illegal trade of weapons, drugs and illegal immigrants making of Puerto Rico the stepping stone for illegal traffic into and out of the United States. As Honorable Justice Diaz Cruz (Appellants Appendix A, p. 45) pointed out:

> "Puerto Rico is 3,600 square mile island completely surrounded by the international waters of the Caribbean Sea and the Atlantic Ocean. This results in a severance of the geographic continuity which merges 48 of the states of the Union into a single territorial body whose safety and order is protected by Congressional and state legislation. Hence, those states are not as vulnerable as Puerto Rico to the entry into their territories of smugglers and traffickers of illegal merchandise."[8]

[8] It is a known fact that Puerto Rico is the distribution center for all type of smuggled goods. Besides weapons and narcotics, the heavy traffic also includes diamonds, to such a point that Peter Hamill's New York Daily News syndicated column has called San Juan the 'dirty and dangerous centerpiece of the international diamond racket.' (San Juan Star, Oct. 21, 1977.)

To conclude, then, Puerto Rico has an "intermediate border" analogous to that of the Virgin Islands, requiring a pragmatic approach to peculiar situations.

II. "Searches without probable cause are a reasonable regulation of traffic in intermediate borders."

What is the rationale behind permitting the international border searches? The 15 Columbia Journal of Transnational Law 2777-3112 (1976) clearly outlines the backgrounds for this exception to the Fourth Amendment, which reads as follows:

> "The United States Supreme Court, early in the nation's history, characterized the right of each sovereign member of the international community to exercise jurisdiction over its territory as 'necessarily exclusive and absolute.'" Inherent in this sovereign capacity of every nation is the right to protect its territorial integrity through the exclusion of foreign nationals."[15]—Accordingly, travelers may be stopped in crossing an international boundary, the Court noted in 1925,
>
> > because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."[16]

The nature and magnitude of the illegal alien problem have, however, necessitated official action at points other than the actual border or its functional equivalents. The number of illegal aliens currently residing in the United States has been estimated to be between ten and twelve million.[17] Approximately 85 percent of these are probably Mexican nationals,[18] an estimate corroborated by the fact that 92 percent of the deportable aliens arrested in 1974 were Mexican nationals.[19] Since 1970, the rate of increase in the number of illegal Mexican immigrants apprehended in this country has been over twenty percent each year; in fiscal 1973 alone, 498,123 deportable Mexicans were arrested by Border Patrol agents.[20]

Both the physical characteristics of the actual border area [21] and the practical demands on manpower allocation [22] dictate that some stopping of traffic take place at locations near, but not at the border. Accordingly, for almost a quarter of a century, agents of the Border Patrol have been granted extensive statutory authority both to stop and to search vehicles, without warrant, in the

course of their duties.[23] Significantly, the power to stop and interrogate suspects has been exercised over a broader geographical area than the power to search. Warrantless searches of vehicles by officers of the Immigration and Naturalization Service (INS) are permitted under section 287 (a) (3) 'within a reasonable distance from any external boundary of the United States.'[24] In contrast, the power to stop and conduct inquiries as to citizenship in the course of a Border Patrol investigation exists without geographical restriction. Under section 287 (a) (1), agents authorized under regulations prescribed by the Attorney General may 'interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.'[25] (Footnotes omitted)

A case in point is that of *U. S.* v. *Glaziou,* 402 F. 2d. 8 (1968) where once again the rational behind border searches was explained.

> ". . . Both Congress and the Courts have long appreciated the peculiar problems faced by customs officials in policing our extensive national borders and our numerous, larger international port facilities . . . Realization of customs officials' special problems has resulted not only in the Courts' giving the broadest interpretation compatible with our constitutional principles in construing the statutory powers of customs officers . . . but has also resulted in the application of special standards . . ." (p. 12)

There is a weighty Puerto Rican interest in overseeing entries across its boundaries, including searches without probable cause.

The legislation under consideration has its origin in the determination of the Commonwealth Legisla-

ture in its seventh special summer session of 1975[27] which in part stated:

> "Puerto Rico is at present entangled in a vigorous campaign directed to prevent the buying and selling, transfer and use of narcotic drugs, firearms, and explosives.
>
> It is widely known that among passengers and crew who arrive in the Island from the United States, there are persons who illegally bring with them or in their luggage, bundles, bags, and packages, firearms, explosives, narcotic drugs and other substances controlled by law. The Federal Government does not require these passengers or crew to go through the Customhouse after arrival in the Island for inspection of their luggage or person. This has contributed greatly to an increase in the smuggling of firearms, explosives, and narcotic drugs by this (*sic*) means, with its concomitant results which are manifested by a rise in criminality and greater insecurity among the citizenship (sic).
>
> The inspection of luggage, cargo and persons to reduce the introduction of firearms, explosives, and narcotic drugs illegally brought from the United States to Puerto Rico is a legitimate area of control on the part of our government in exercising its police power, especially when the same is not covered by the Federal Government, and there is no conflict of authority on this matter between both governments."

Thus Puerto Rico's Legislature acknowledged the existence of a serious public safety problem caused by the illegal introduction of firearms, explosives and narcotics drugs through our airports and docks by passengers and crew members arriving from the

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[27] Public Law No. 22, supra.

United States. The need arose for the government of the Commonwealth to set up "some sort of effective and corrective measure to eliminate this increasing illegal traffic which was progressively becoming more profitable, in view of the fact that there was no control on the part of the United States government".[18]

The Act was thus adopted to take a stand against the helplessness of the country in the increasing traffic of weapons, drugs and explosives. It was enacted as ". . . society's urgent and critical protective measure against the appalling degree of violence that has quashed people's right to life, freedom and property. It was not enacted as a hysterical reaction, but responding to a state of anguish and insecurity that has befallen Puerto Rico. . ." (See Mr. Justice Díaz Cruz, Appellants Appendix A p. 53).[19]

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[18] See Appellant's Jurisdictional Statement, Appendix C, pag. 112.

[19] The grave criminality problems which Puerto Rico faces are clearly depicted in various opinions of several Justices of the Supreme Court of Puerto Rico. For example Justice Martin (Appellant Appendix A, p. 60 p. 63) says:

> "The defenselessness of our borders is evident. The increase in criminality mostly imported, evinced by the great number of crimes connected with unregistered weapons, as well as those related to controlled substances and explosives, forced the Legislature to take measures to effectively fight criminality through said Act 22 and consequently, to protect the security of and bring peace to the citizenry." (P. 60)
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> ". . . The statement of motives of this Act reveals the crisis the country is going through as a result of the crime wave which is greatly due to the ease with which weapons, explosives, and controlled substances are obtained and to the inevitable impunity with regard to the offenders . . ." (P. 63)

(Footnote 19 continues on facing page)

The law under scrutiny is but part of an extensive governmental effort to counter the criminal tide that has overtaken the island commonwealth. In the Justice Reform of 1975 the Commonwealth government took drastic action for the reduction and restriction of the sales use of weapons. (Title 25 LPRA, Secs. 432 412, 415, 418(a), 436, 438, 440, 444, 449)

To cope with this situation the first section of the particular Act that concern us here provides:

> "The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States, to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances".

Again Justice Negrón García (Appellants Appendix A. pág. 97) points out:

> "Likewise, the inspection in search for drugs, represents another effort by Puerto Rico to avert an evil which is destroying the foundations of our society. There is a close relationship between the traffic and use of narcotics and the rise in criminality throughout the country. The common citizen no longer feels safe in his home, in his car, nor when walking through the streets; but not because of the use and traffic of narcotics in itself, but because of the carrying and use of lethal weapons by individuals related to their illegal commerce. The attention caught by the criminal aspects of the traffic and use of narcotics has diverted the knowledge of the true finality of laws on drugs, whose objective is preventing their use because of the threat to public health. We have seen, when discussing state power to inspect, that the protection of public health is a valid constitutional exercise of this power". (P. 97)

It is evident from its text that the Police is authorized to carry out two different activities at airports and docks—namely the inspection of luggage, packages, bundles and cargo which does not require "reasonable grounds" and the detention, questioning and search of individuals with regard to which there reasonable grounds to believe that they are illegal carrying about their persons firearms, explosives, narcotic substances or similar substances.

It is thus our contention that the Legislature acted in the valid exercise of its power to protect the life and property of the People of Puerto Rico. As clearly set out in the case of *Commonwealth* v. *Rosso,* 95 P.R.R. 488, 523-4 (1967) the power of the Commonwealth to protect the safety of its residents "is consubstantial with its existence as a state and inseparable from its police power".

The state power to establish inspection laws has been accepted by the Constitution as well as by the case law of the Federal law of the Federal Supreme Court. Article 1, Sec. 10, paragraph 2, of the Constitution of the United States, insofar as pertinent provides:

> "No state shall, without the Consent of the Congress, lay any imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . ."

Since *Gibbsons* v. *Ogden,* 9 *Wheaton* 1, 203, 6 L. Ed. 23 (1824), the Supreme Court spoke in the following terms with regard to state power over inspection laws:

> "But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution, as being passed in the exercise of a power remaining with the states. That inspection laws . . . form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description . . . are component parts of this mass".

Thus the Supreme Court acknowledges that the constitutional provisions not only establishes the right of states to adopt inspection laws, but tacitly grants the right to prohibit exportation and importation of certain articles. Obviously this right to prohibit includes dangerous or harmful articles.

In this context Act No. 22, as attacked in this case, is a type of inspection law which authorizes the examination of luggage with the purpose of enforcing laws against weapons, explosives, and drugs.

The four member opinion of the Supreme Court of Puerto Rico said that to give Puerto Rico the power to search passengers arriving in the islands ports and airports would give the Commonwealth a power that no other state has. This argument avoids the reality of Puerto Rico's peculiar situation. Many states of the union which do not have actual geographical frontiers with either Canada, Mexico or the Soviet Union are not therefore deprived of search powers given populous frontiers states like California, Texas and New York.

The state's power to remove and destroy explosives under its police power and possible under inspection laws was accepted in the opinion of the Supreme Court delivered by Justice Marshall in *Brown* v.

Maryland, 12 Wheaton 419, 443, 6 L. Ed. 678, 687 (1827) wherein the following was stated:

> "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states. . . . We are not sure, that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power. . ."

In the *Mayor of the City of N.Y.* v. *Miln,* 11 Peters 102, 139-142, 9 L. Ed. 648, 662-664 (1937) one undoubtedly notes the state inspection powers:

> ". . . That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends. . . That all those powers . . . what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive."
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> * * *
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> ". . . We suppose it to be equally clear, that a state has as much right to guard, by anticipation, against the commission of an offence against its laws, as to inflict punishment upon the offender, after it shall have been committed. The right to punish, or to prevent crime, does in no degree depend upon the citizenship of the party who is obnoxious to the law. The alien who shall just

> have set his foot upon the soil of the state, is just as subject to the operation of the law, as one who is a native citizen."
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> * * *
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> ". . . The power to pass inspection laws, involves the right to examine articles which are imported, and are, therefore, directly the subject of commerce; and if any of them are found to be unsound or infectious, to cause them to be removed, or even destroyed. But the power to pass these inspection laws, is itself a branch of the general power to regulate internal police."

We understand that the state power is essential to that a soverign nation; that inspection laws are part of power; that these laws include the power of inspection, removal, and destruction and that the police power embraces crime prevention even with regard to people coming from abroad.

The power of inspection also covers the power to inspect articles coming from other states. This was sustained by this Honorable Court in *Patapsco Guano Co.* v. *Board of Agriculture,* 171 U.S. 345, 357 (1897) upon stating:

> "Whenever inspection laws act on the subject before it became an article of commerce they are confessedly valid, and also when, although operating on articles brought from one State into another, they provide for inspection in the exercise of that power of self-protection commonly called police power."

Said Court also acknowledged the power of the states to forbid the introduction of articles that are not in legal commerce. In *Compagnie Francaise* v. *State Board of Health, Louisiana,* 186 U.S. 380, 391 (1902),

the Court rephrased the standard stated in several cases:

> "... it was held that a state law absolutely prohibiting the introduction, under all circumstances of objects actually affected with disease, was valid because such objects were not legitimate commerce ... the power to absolutely prohibit additionally obtains where the thing prohibited is not commerce, and hence not embraced in either interstate or foreign commerce."

Recently the state power to adopt inspection laws was reaffirmed in *California* v. *Thomson*, 313 U.S. 109, 114 (1941), which holds that the states may adopt inspection laws applicable to articles in interstate commerce as long as said laws do not substantially obstruct or discriminate commerce and Congress has not occupied the field. We must emphasize that nobody questions whether the inspection of the luggage of a passenger arriving at Puerto Rico is a matter on which Congress has legislated; the Federal Government has not occupied the enforcement area assigned to the Police of Puerto Rico by the challenged statute.

Less than a year ago the Supreme Court, through a summary action, denied an appeal questioning the constitutionality of an inspection law of the State of Florida as to (1) the authority it granted to stop transporters on state roads for inspection of agricultural products without there being probable cause or suspicion that they were carrying agricultural products, and (2) the authority to conduct a search both unreasonable and contrary to the right of privacy and the right to travel freely. The appeal is summarized in 46 L.W. 3005 as denied in 46 L.W. 3130 (Session of October 3, 1977). The case sustains that "appellee has full

authority under the police power of the State of Florida to conduct agricultural inspection of the vehicles" and it ends saying: "It is our view that the requirement of the foregoing statute that all trucks and trailers stop at the inspection stations of appellee for agricultural inspection is entirely reasonable and is a valid exercise of the police power of the state. *Stephenson* v. *Department of Agriculture & Consumer Service*, 342 So. 2d 60 (1977).

The principles stemming from the commented case law, establish that the state's Police Power is like that of sovereign nations, and it embraces: a) the prevention of crime even as to foreigners entering the state, b) the revision and destruction of explosives; and c) the prohibition of entry of article excluded from legal commerce. In short, inspection laws derive from this police power and include such powers as the power to search without probable cause and to restrict and to forbid the entry of articles from other states, as long as said laws do not discriminate or obstruct interstate commerce substantially.

The case at bar demands "... the composure (necessary) to fuse the rights of the individual which if unrestrained could be conflictive among themselves and the right of the community—represented by the Legislature—to life, health, and welfare". 4 *Diario de Sesiones de la Convención Constituyente* (Journal of Proceedings of the Constitutional Convention) 2576 (1961 ed.).

The Act authorizes routine and random searches of luggage and bundles at point of entry in our island such as airports and docks which we have already classified as intermediate borders. We are thus faced with

the state's interests in curbing the arrival at our shores and airports of destructive, degrading instruments with the right of those arriving not to have their luggage searched.[20] It is our contention then that the individual rights to privacy should yield to the preponderant right to protection of the life and property of the vast Puerto Rican community and that a balance should be present between society and community interests versus the individual's interests.[21] In final analysis one must conclude that the measures taken by the Commonwealth in restricting the importation of illegal drugs and arms were reasonably related to the danger they seeked to control and are within the more ample exception that the intermediate frontier allows.

The expectation of privacy of a person boarding a plane is not the same as that expectation in not having his home searched.

In view of the mobility of the populations, of the modern means of transportation and communication, the terror of hijacking and the abuses of illegal traffic, airport searches have become generalized to the point that individuals entering the nation and those boarding planes on the nation know and realized they have no expectation of privacy in these cases. As the Supreme

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[20] The island government has kept in mind the activities of the F.L.N. terrorists movement in the continental United States and has sought to prevent its proliferation in Puerto Rico itself.

[21] It must be noted that in the case at bar no abusive act was mentioned as to the way the defendant was stopped. The search was limited to the two suitcases in which a bag of marihuana was found along with the pipe containing residues of said narcotic and two hundred fifty thousand dollars ($250,000) in cash. Thus, this is a clear case in which a slight inconvenience to the passenger should yield to the welfare, security and health of the community. The reduced intrusiveness of the stop being then significant in the determining the propriety of the stop.

Court said in *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 376:

> "... a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country."

Lately on the case of *United States* v. *Chadwick*, decided on June 21, 1977, 45 L.W. 4797, this Honorable Court held that the privacy expectancies in luggage are greater than those existing with regard to an automobile, yet it also stated that baggage may be exposed to public view as a requirement for entry at borders or when traveling on a vehicle. The latter validates searches of suitcases belonging to individuals traveling on commercial airplanes.

Insofar as to the right to travel question this right has been consistently weighed against compelling interest of the state in order to justify its restrictions. In this case the compelling interest is that of combating the criminal tide that threatens directly the welfare of the people who live in Puerto Rico and indirectly the totality of the American population.

Finally, the fourth Amendment was not adopted to impose intellectual nearsightness on the states in handling the serious problems that threaten their internal security.

One cannot but echo Justice Diaz Cruz, (Appellant Appendix A pp. 54, 57) idea on the contemporaneous vitality of the Constitution when he argues:

> "A court should not abstain from making the constitutional law that the times demand. The great value of the Constitution of the United States as supreme instrument of Law is largely due to the legal thought of the judges who have undertaken its interpretation throughout two centuries. On his day, each one faced the problems of his epoch. Their decisions, preserved for the ones that followed, enjoy the prestige of their intelligence analyzing and declaring the Law as they understood it. Nevertheless if any one element has influenced the development of Constitutional Law, it has been the free exercise of the creativity of judges who did not confine their adjudicative power to concepts already enunciated before them, nor did they lock it up in the *conceptual prison of stare decisis*. As in any other area, Constitutional Law precedents help to direct the though of future generations, but not to fetter and paralyze the thought and the deliberative power at the moment in which they were produced. If North American constitutional criterion had come to a standstill, set on anachronical precedents, the nation would have not attained the political and personal freedom enjoyed by its citizens. That there is but one text of the Constitution, varied by the way it has been understood by different generations of judges, is evidence in the broadening of the concept of "due process" contained in the Fourteenth Amendment. . . . Such varied pronouncements, some of which seem unusual to us today, responded to the judicial thought of the time, inevitably molded by ethical and moral concepts, and social needs of the time. The evolution of civilization and continuous progress and the new challenges to legal order, require a renewed constitutional law fit

> for our times, exercised freely and unencumbered by resonant precedents, some of great humanitarian content, but ineffective today to protect the Constitution from its critics. Democracy and freedom are not defended by swan songs or odes that had their time and place but that today are mere refrains for minstrels. The value of the Constitution lies in its vital content of liberty which will last as long as judges who carry it in their heart discover its contemporaneousness."

Considering the alarming Puerto Rican crime situation we think the Puerto Rico's Legislature has not exceeded Constitutional restraints by allowing searches without probable cause to be conducted on baggage entering its border ports and airports.

CONCLUSION

For the reasons above set forth, it is respectfully requested that this appeal be dismissed and/or the judgment affirmed because the appeal as a whole does not present a substantial federal question and/or because at least one federal question sought to be reviewed was not timely or properly raised nor expressly passed on.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF PUERTO RICO

No. Cr-77-24

THE PEOPLE OF PUERTO RICO, *Plaintiff and appellee*

v.

TERRY TEROL TORRES LOZADA, *Defendant and appellant*

Judgment of the Superior Court, San Juan Part,
Charles E. Figueroa, Judge

Article 404, Controlled Substances Act

Motion for Reconsideration

TO THE HONORABLE COURT:

Comes now appellant, Terry Terol Torres Lozada, represented by the undersigned, one of his attorneys, and very respectfully prays this Honorable Court to reconsider its decision rendered on December 14, 1977, sustaining the legality of Act No. 22 of August 6, 1975 (25 L.P.R.A. § 1051) and affirming appellant's conviction for possession of marihuana.

In support of this motion appellant states the following:

1. On December 14, 1977 this Honorable Court affirmed the conviction of appellant, who was stopped and searched under said Act No. 22. Four justices of this Honorable Court stated their opinion in the sense that appellant's conviction violated the Fourth Amendment of the United States Constitution. Three justices of this Honorable Court stated that appellant's rights under the Fourth Amendment were not violated. One of the justices of this Honorable Court, Honorable Marco A. Rigau, took no part in the consideration and decision of the case.

Although the majority of the members of this Honorable Court who sat in the case were of the opinion that said Act No. 22 is unconstitutional, the Court held that it could not declare said Act unconstitutional because Article 5, Section 4, of the Constitution of the Commonwealth of Puerto Rico requires the vote of the majority of the justices who compose the Court in order to declare a law unconstitutional. Although this Honorable Court is composed of eight justices, one of them, Hon. Marco A. Rigau, took no part in the case.

2. On December 21, 1977 appellant filed a notice of appeal and a motion to stay the mandate while the case was appealed before the Honorable Supreme Court of the United States. On January 11, 1978, appellant filed an amended notice of appeal and requested the translation and remittance of the record of the case to the Honorable Supreme Court of the United States.

3. On March 1, 1978, Hon. Justice William J. Brennan, Jr., of the Honorable Supreme Court of the United States granted appellant an extension up to and including May 13, 1978 to docket his appeal and/or to file a petition for a writ of certiorari before the Supreme Court of the United States. On April 4, 1978, the Clerk of the Supreme Court of Puerto Rico delivered the English translation of the record of this case to appellant's attorneys.

4. On or about April 4, 1978, the famous opera singer Justino Diaz was arrested at Isla Verde International Airport, after he was searched under said Act No. 22. His arrest caused a controversy in the Island and drew attention again on the constitutionality of said Act No. 22.

5. On April 11, 1978, a news report published in the newspaper "El Mundo" informed that Hon. Justice Marco A. Rigau was willing to pass judgment and vote on Act No. 22 of August 6, 1975. A copy of said news report is attached to this motion as part of the sworn statement included with and made part of the same.

6. Appellant has requested the Honorable Supreme Court of the United States to review the decision of this Honorable Court sustaining the constitutionality of said Act No. 22. He has also requested review of the decision on the basis that Article 5, Section 4, of the Constitution of the Commonwealth of Puerto Rico violates the requirement of due process of law guaranteed by the United States Constitution. We understand, however, that since Hon. Justice Marco A. Rigau is willing to pass judgment and vote on the question raised, the interests of justice are best served if this Honorable Court agrees to reconsider the decision in this case, with the participation of the aforementioned justice.

7. Besides the foregoing, appellant prays this Honorable Court to reconsider its decision affirming the judgment appealed from in the absence of the absolute majority required by the Constitution to invalidate said Act No. 22. The fact that the court allowed only seven out of the eight justices who make up the Court to sit in the case, deprived appellant of the due process of law guaranteed by the Constitutions of the United States and of Puerto Rico. Appellant's due process of law was further restricted when, notwithstanding the requirement of absolute majority of the total of justices who compose the Court the case was submitted to the consideration of only seven justices, particularly when appellant's only opportunity to learn of this situation was after the judgment was rendered. Appellant did not raise this issue in his brief, since he could not anticipate that since the Court was made up of eight justices, only seven of them would sit in a case which, by constitutional provision, required at least an absolute majority of the justices who make up the Court.

Besides depriving appellant of his right to the due process of law on appeal, Article 5, Section 4, of our Constitution, as it was applied in this case, deprived appellant

of his right to a full and fair hearing as required by the case of *Stone* v. *Powell,* 428 U.S. 465, 49 L.Ed.2d 1067; 96 S. Ct. 3037.

8. Should this Honorable Court decide to reconsider its decision appellant binds himself to withdraw the appeal as soon as that decision is taken.

9. Should this Honorable Court consider that its Rules do not provide for a situation as the one under consideration, appellant prays that this Court exercise the authority conferred by Rule 50 of said Rules, on the ground that this is one of the cases to which said Rule refers.

WHEREFORE, appellant respectfully prays this Honorable Court to reconsider its decision of December 14, 1977 in accordance with the statements set forth in this motion.

In Mayaguez for San Juan, Puerto Rico, this 14th day of April 1978.

I CERTIFY: That on this same date I have served a copy of the foregoing motion upon the Honorable Solicitor General, Department of Justice, Box 192, San Juan, Puerto Rico.

CELEDONIO MEDIN LOZADA
CELEDONIO MEDIN LOZADA GENTILE
Attorneys for Defendant-Appellant
133 Leon Street
Mayaguez, Puerto Rico

(Sgd.)
By: CELEDONIO MEDIN LOZADA

SWORN STATEMENT

I, CELEDONIO MEDIN LOZADA, of age, married, lawyer, and resident of Mayaguez, Puerto Rico, do hereby state under oath:

That the news report attached herein, headlined: "Justice Says Willing to Vote on Act Authorizing Airport Searches" was publshed in the newspaper "El Mundo" in the edition of Tuesday, April 11, 1978, and clipped from said newspaper and attached to the "Motion for Reconsideration."

Mayaguez, Puerto Rico, this 14th day of April 1978.

(Sgd.) CELEDONIO MEDIN LOZADA

AFF. NO. 2731

Sworn to and subscribed before me by Celedonio Medin Lozada, of the aforesaid personal circumstances, personally known to me, in Mayaguez, Puerto Rico, on this 14th day of April 1978.

(Sgd.) MIGUEL HERNANDEZ COLON
NOTARY PUBLIC

APPENDIX B

IN THE SUPREME COURT OF PUERTO RICO

(Caption omitted in printing)

Resolution

San Juan, Puerto Rico, May 4, 1978

Appellant's motion for reconsideration is hereby denied.

It was so agreed by the Court and certified by the Chief Clerk. Mr. Justice Rigau took no part in this decision.

(Sgd.) ERNESTO L. CHIESA
Chief Clerk

CHIEF CLERK'S CERTIFICATE

I, Ernesto L. Chiesa, Chief Clerk of the Supreme Court of Puerto Rico, Do HEREBY CERTIFY:

That the annexed document is a true, exact and official translation from Spanish into English (said official translation having been made under the authority of Act No. 87 of May 31, 1972), of the Resolution rendered by this Court on May 4, 1978 in the above-entitled case (Cr-77-24), the original of which, in Spanish, is under my custody in this office.

IN WITNESS WHEREOF, and at the request of the interested party, I issue these presents for official use, free of charge, under my hand and the seal of this Court, in San Juan, Puerto Rico, this 28th day of June 1978.

/s/ ERNESTO L. CHIESA
Chief Clerk
Supreme Court of Puerto Rico

COMMONWEALTH OF PUERTO RICO

SUPREME COURT

OFFICE OF THE SECRETARY

SAN JUAN, PUERTO RICO

Chief Clerk's Certificate

I, Ernesto L. Chiesa, Chief Clerk of the Supreme Court of Puerto Rico, Do HEREBY CERTIFY:

That the annexed document is a true and faithful translation from Spanish into English of the Motion for Reconsideration, which is part of the record in case Cr.-77-24 *The People of Puerto Rico* v. *Terry Terol Torres Lozada,* of April 14, 1978, the original of which, in Spanish, is under my custody in this office.

IN WITNESS WHEREOF and at the request of the Office of the Solicitor General of Puerto Rico, I issue these presents for official use, free of charge, under my hand and the seal of this Court in San Juan, Puerto Rico, this 30th day of May, 1978.

/s/ ERNESTO L. CHIESA
Ernesto L. Chiesa
Chief Clerk
Supreme Court of Puerto Rico